



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

October 14, 1993

Honorable Bryan Davis
County Attorney
P.O. Box 736
Nacogdoches, Texas 75961

Letter Opinion No. 93-90

Re: Whether a county generally may incur
debt by executing a vendor's lien note for the
purchase of real property (ID# 19572)

Dear Mr. Davis:

You ask us "whether a Texas county, namely, Nacogdoches County, can properly and legally purchase real estate and execute a vendor's lien note to secure the sales price for it." You inform us that such a transaction would be financed by a local bank. Because your request is stated in general terms, we are unable to give you a definite answer. We hope the following general rules and authorities will assist you in concluding whether your county's contemplated transaction is permissible.

Commissioners courts do not have a general power to purchase real property. "While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by any such court must be ultimately found in the Constitution or the statutes." *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948). Therefore, whether your county may purchase real property depends on whether the purchase falls within a power expressly conferred by law. For example, section 331.001 of the Local Government Code empowers counties to "purchase . . . land . . . to be used for public parks, playgrounds, or historical museums."

Likewise, commissioners courts do not have a general power to incur debt. "Counties . . . possess only the powers granted expressly or by necessary implication in the Texas Constitution and statutes. . . . This rule applies to the creation of debt." Attorney General Opinion JM-642 (1987) (citing authorities). Thus, for example, section 331.004 of the Local Government Code empowers counties to "issue negotiable bonds for the purpose of acquiring . . . land . . . for park purposes" and requires that such bonds be issued in accordance with statutory requirements.

The Texas courts have recognized the counties' power to issue interest-bearing warrants as being implied by necessity to execute the powers conferred on them by law. *E.g., Lasater v. Lopez*, 217 S.W. 373, 376 (1919) (counties' authority to issue interest-bearing warrants to finance building of county roads was lawful means for executing general power to establish roads); *San Patricio County v. McClane*, 58 Tex. 243, 244 (1883) (county court's express power to provide courthouses and jails and to direct

payment of county accounts "in such manner and at such times as may meet the public interest" was broad enough to empower county to issue interest-bearing warrants to pay for construction of courthouse and jail).

On the other hand, the power to issue negotiable instruments has not been recognized as being implied by necessity. See *San Patricio County v. McClane*, 44 Tex. 392, 397 (1876) (interest-bearing county warrants were not commercial paper and so were not subject to rule that county cannot, "[w]ithout special authority," issue commercial paper that would deny it defense it might have against original creditor). "There is no inherent power or right of a county to issue bonds. 'It is not a power to be implied. It does not exist unless expressly conferred by law.'" Attorney General Opinion MW-500 (1982) (quoting *Lasater v. Lopez*, 217 S.W.2d at 376).

A recurring theme in the cases . . . holding [that a county has no authority to issue negotiable bonds] is that the legislature ought to expressly allow a county to issue paper debt against which it might be precluded from asserting defenses to the claim. For example, bonds issued to build a jail that does not work still have to be paid.

35 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 17.4 at 570 (Texas Practice 1989). The vendor's lien note that you mention, if negotiable, would not be permissible unless the county had express authority to issue such a negotiable instrument; but a non-negotiable note would be permissible if the power to issue it were conferred expressly by law or were implied by necessity to execute the powers expressly conferred by law on your county.¹

Regarding the power of a county to encumber its property, article XI, section 9, of the Texas Constitution provides that "all . . . property [of counties, cities and towns]

¹Texas Constitution article XI, section 7, prohibits any city or county from incurring any debt "unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund." In Attorney General Opinion JM-642 (1987) at 6-7, this office cited authorities for the following points relating to article XI, section 7:

An obligation will not create "debt" within the meaning of article XI, section 7, when the transaction itself generates enough revenue to cover the obligation of the governmental unit. . . .

Texas courts uphold "debt" transactions against constitutional challenge under article XI, section 7, when current revenues or revenues which are generated by the transaction and which are within county or city control are sufficient to cover the "debt." . . . Case law has not, however, always established a clear rule under article XI, section 7.

devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation." This exemption does not mean, however,

that a county . . . cannot voluntarily incur an encumbrance--typically a purchase money mortgage or vendor's lien--under which public property may be foreclosed and eventually sold. . . . The courts simply consider that the enforcement of a lien incurred voluntarily and contractually cannot be considered a "forced sale."

35 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 9.4 (Texas Practice 1989); e.g., *City of Dayton v. Allred*, 68 S.W.2d 172, 179 (1934) (mortgage on improvements financed by wastewater revenue bonds was not violative of article XI, section 9, because foreclosure pursuant to such voluntary deeds of trust is not considered forced sale). We conclude that there is no general prohibition against a county's voluntarily mortgaging property that it purchases.

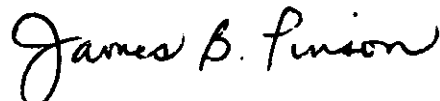
S U M M A R Y

Commissioners courts do not have a general power to purchase real property. Whether a county may purchase real property depends on whether the purchase falls within a power expressly conferred by law.

Nor do commissioners courts have a general power to incur debt. Their power to incur debt may be granted expressly or, generally, by necessary implication from a grant of a power to do something that requires the creation of debt. The power to issue negotiable instruments that would deprive the county of a defense assertable against the original creditor cannot be implied by necessity.

There is no general prohibition against a county's voluntarily mortgaging property that it purchases.

Yours very truly,



James B. Pinson
Assistant Attorney General
Opinion Committee